**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION**

ELLEN JOHNSTON **PLAINTIFF**

V. **CIVIL ACTION NO.: 2:07CV42 P-B**

ONE AMERICA PRODUCTIONS, INC., EVERYMAN PICTURES, TWENTIETH CENTURY-FOX FILM CORPORATION and JOHN DOES 1 AND 2 **DEFENDANTS**

REBUTTAL MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE EXHIBITS A THROUGH E TO PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendants One America Productions, Inc. and Twentieth Century Fox Film Corporation ("Defendants") submit this Rebuttal Memorandum in Support of their Motion to Strike Exhibits A Through E to Plaintiff's Response in Opposition to Defendants' Motion to Dismiss.[1]

A. The material submitted by Plaintiff in opposition to the Motion to Dismiss is different in both character and purpose than that submitted by Defendants.

Plaintiff's primary argument against the motion to strike is basically "they did it, so I can too." Plaintiff exhibits a fundamental misunderstanding of the material attached to the Motion to Dismiss, and the reasons why that material is appropriate – if not necessary – to the Court's consideration of that motion. Although Plaintiff treats all the material attached to Defendants' motion the same, it actually falls into two distinct categories: those matters that are central to Plaintiff's complaint (the movie and in particular the scene on which Plaintiff's claim rises or falls) and those matters of which the Court can take judicial notice - the worship style of members of the Pentecostal denomination. Nothing offered by Plaintiff falls into either

[1] On August 8, Plaintiff filed a combined Response to Defendants' Motion to Strike and Response to Defendants' Opposition to Plaintiff's Motion for Leave to Amend Complaint. Although Plaintiff's "a tort is a tort is a tort" argument is not clear, Plaintiff appears to withdraw her request to add a "superfluous" claim for intentional infliction of emotional distress.

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category. Instead, Plaintiff offers affidavits and radio interview excerpts in an attempt to create "fact questions" where the matters raised in the motion are questions of law for the Court to determine: whether the depiction of Plaintiff is capable of the meaning she ascribes to it, and whether that meaning is actionable. *See Mitchell v. Random House, Inc.*, 865 F.2d 664, 669 (5th Cir. 1989)

B. The transcript of the NPR interview is "classic hearsay."

Plaintiff argues that because her counsel's office staff accurately transcribed a recording available at some point on the National Public Radio website, the statements in that transcript are not hearsay. Even if Plaintiff had attached a recording of the entire interview exactly as it aired (which she did not), she would have the same problem. She relies on these out-of-court statements for the truth of the matters asserted. As the cases cited in Defendants' original memorandum make clear, television and radio broadcasts – even those of distinguished programs like "60 Minutes" or respected institutions like National Public Radio – are "classic hearsay." *See Borroto v. Campbell,* No.: 3:92cv2101-H, 2002 Wl 655523 (N.D. Tex., April 18, 2002)*; Kallstrom v. City of Columbus*, 165 F. Supp. 2d 686 (S.D. Ohio 2001); *Worsham v. Provident Companies, Inc.,* 249 F. Supp. 2d 1325 (N.D. Ga. 2002). Plaintiff makes no meaningful attempt to distinguish these cases and in fact mentions only *Borotto* (referred to by Plaintiff as the "Frontline" case).

Plaintiff argues that her evidence is different because the voice on the broadcast is Sacha Baron Cohen's voice, where the "Frontline" segment involved "commentary . . . to explain what was shown in pictures." Setting aside the fact *Borotto* does not make this artificial distinction, Plaintiff has not provided the necessary foundation to authenticate the recording. And even if she had, the fact that it is Cohen speaking does not change the character of the evidence. The problem is explained by the *Worsham* court:

> the declarants on the videotapes have not been deposed, nor have they provided affidavits or other statements to this Court. Second, Plaintiff argues that "[t]he individuals who appeared in the submitted programs ... clearly establish that Defendant had a company wide program to terminate claims such as the claim made by Plaintiff." Because the individuals on the videotapes state that Defendants had such a policy, the Court concludes that Plaintiff's purpose for submitting these materials is to prove the truth of the matter asserted. Consequently, these materials are "classic hearsay" and will not be considered by the Court for purposes of the pending motions.

Worsham, 249 F. Supp. 2d at 1336-1337.

Plaintiff even suggests that the broadcast is a business record within Fed. R. Evid. 803(6) because NPR is in the business of airing recorded interviews. If that were so, then everything broadcast on radio or television would fit that exception. And Plaintiff still would have to establish that the statements made in the broadcast met some other hearsay exception. *See, e.g., Bemis v. Edwards*, 45 F.3d 1369, 1372 (9th Cir. 1995) (although 911 tape itself might qualify as business record, recorded statements by citizens must satisfy separate hearsay exception).

C. The matters asserted in Clearance And Copyright are not the type of which the court can take judicial notice.[2]

Plaintiff takes umbrage at the Defendants' suggestion that *Clearance And Copyright* is not a scholarly work. The Court can make its own determination. The excerpts cited by Plaintiff are from Chapter 4. There is no authority cited within the text for any proposition stated there. The book does contain an appendix titled "Table of Cases" that lists, by chapter, cases purportedly discussed therein. For Chapter 4, there are three "cases" listed with no attempt to connect them to the text. One of the three is not really a case citation, but is simply "*Stecco v.*

[2] The purpose for which this book is offered is unclear. Plaintiff does not rely on the book to establish facts of which she asks the Court take judicial notice. Instead, Plaintiff cites to the book - rather than Mississippi case law -- as authority for the elements of a privacy claim. Plaintiff also cites the book - not official court documents - as authoritative on a false light claim involving the film "Roger and Me."

Moore." The introduction to the Table of Cases provides this helpful instruction: "When you first read a law case, skip over all the introductory stuff and go right to the summary of facts that the courts use to start an opinion. As you get into the opinion itself, skip over all the case cites within the opinion; they will only distract you."

CONCLUSION

Plaintiff has submitted materials outside the pleadings that are not central to the questions of law presented by Defendants' Motion to Dismiss and that are inadmissible under the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Defendants respectfully request that Plaintiff's materials be stricken from the record and not be considered by the Court.

THIS, the 15th day of August, 2007.

Respectfully submitted,

ONE AMERICA PRODUCTIONS, INC.,
AND TWENTIETH CENTURY FOX FILM
CORPORATION
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CERTIFICATE OF SERVICE

I, Donna Brown Jacobs, one of the attorneys for Defendants, hereby certify that I have this day filed the above and foregoing REBUTTAL MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE EXHIBITS A THROUGH E TO PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS with the Clerk of the Court via the Court's ECF System which served a true copy upon the following via the Court's ECF system:

William O. Luckett, Jr.
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ATTORNEY FOR PLAINTIFF

SO CERTIFIED, this the 15th day of August, 2007.

s/ Donna Brown Jacobs
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